STATE OF MICHIGAN

COURT OF APPEALS

LOREAN ALLEN,

Plaintiff-Appellant,

v

VICTORIA AHARAUKA and DETROIT MEDICAL CENTER,

Defendants-Appellees,

and

HARPER HOSPITAL, SINAI HOSPITAL OF GREATER DETROIT, AND SINAI GRACE HOSPITAL,

Defendants.

UNPUBLISHED
May 5, 2009

No. 283890
Wayne Circuit Court
LC No. 07-724470-NH

Before: Wilder, P.J., and Meter and Servitto, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendants' motion for summary disposition of her medical malpractice case under MCR 2.116(C)(7), and of her ordinary negligence claim, presumptively under MCR 2.116(C)(8). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

With regard to the medical malpractice claim, the trial court determined that plaintiff failed to send the notice of intent required by MCL 600.2912b to defendant Harper Hospital ("Harper"), and failed to send the notice to defendant Victoria Aharauka, a nurse at Harper, at her "last known professional business address or residential address". The statute requires that a notice of intent to file a claim be mailed at least 182 days before the lawsuit is commenced "to the last known professional business address or residential address of the health professional or health facility who is the subject of the claim." While plaintiff sent a notice to The Detroit Medical Center ("DMC"), and although it is uncontested that Harper is an affiliate of the DMC and that the DMC was being sued as the principal, plaintiff mistakenly sent notices of intent to Sinai Hospital of Greater Detroit, doing business as Sinai-Grace Hospital ("Sinai-Grace"), and to Aharauka at Sinai-Grace, rather than to Harper and to Aharauka at Harper. Plaintiff argues that

the notice of intent sent to the DMC satisfied the prerequisites of the statute with respect to defendants Harper and Aharauka. In making this assertion plaintiff relies on Harper's affiliate status with DMC, the fact that Harper's corporate offices are at the same address as the DMC, and the fact that an attachment to the notice indicated that plaintiff was a patient of Harper under the nursing care of Aharauka at the time of the alleged malpractice.

We review the grant of summary disposition de novo. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005).

In *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 64; 642 NW2d 663 (2002) (*Mecosta I)*, our Supreme Court held that the statute of limitations on a medical malpractice claim is tolled pursuant to MCL 600.5856 only if all the requirements included in § 2912b are met. In *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 691; 684 NW2d 711 (2004) (*Mecosta II)*, our Supreme Court held that the plaintiff bears the burden to establish compliance with MCL 600.2912b. In *Fournier v Mercy Community Health Care Sys-Port Huron*, 254 Mich App 461; 657 NW2d 550 (2002), this Court found that notices of intent mistakenly sent to one intended recipient did not serve to toll the limitations period with regard to defendants to whom the notices were not sent. The *Fournier* Court held that "[t]he Legislature's use of the word "shall" in subsection 2912b(2) makes mandatory the requirement that the notice be mailed in accordance with its provisions." *Id.* at 468. In rejecting the plaintiff's arguments, the *Fournier* Court also stated that "good faith" efforts would not suffice, and that prejudice or delay was irrelevant given the clear language of the statute. *Id.* at 469.

We conclude that plaintiff failed to send a notice of intent to Harper. Plaintiff's notice sent to the DMC was addressed to Sinai-Grace. A notice of intent sent to the DMC and addressed to Sinai-Grace is not a notice sent to Harper. We further conclude that plaintiff failed to send a notice to Aharauka at either her last known professional business address or her residential address. Although a notice was actually "sent" to Aharauka's attention, it was not addressed to Aharauka at Harper but was instead addressed to Aharauka at Sinai-Grace. Since Sinai-Grace was not Aharauka's professional or business address, the trial court properly granted summary disposition on plaintiff's medical malpractice claim.

Furthermore, we conclude that the trial court properly dismissed the ordinary negligence claim on ground that it sounded in medical malpractice. In *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 422; 684 NW2d 864 (2004), our Supreme Court held:

> A medical malpractice claim is distinguished by two defining characteristics. First, medical malpractice can occur only "'within the course of a professional relationship.'" [*Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 45; 594 NW2d 455 (1999)] (citation omitted). Second, claims of medical malpractice necessarily "raise questions involving medical judgment." *Id*. at 46. Claims of ordinary negligence, by contrast, "raise issues that are within the common knowledge and experience of the [fact-finder]." *Id*. Therefore, a court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or medical malpractice: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common

> knowledge and experience. If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern medical malpractice actions.

In *Sturgis Bank & Trust Co v Hillsdale Cmty Health Ctr*, 268 Mich App 484, 497-498; 708 NW2d 453 (2005), a claim of ordinary negligence was premised on a nurse's failure to take actions that would have prevented the plaintiff from falling. This Court stated:

> [P]laintiff alleged in the complaint that defendant's nurses were negligent in failing to prevent Walling's fall, in permitting her to arise unassisted, in failing to protect her from falling, and in otherwise failing to exercise such measures when the nurses knew, or should have known, of Walling's risk of falling. The complaint also alleged that, at the time of the fall, Walling was lethargic, in pain, uncooperative, noncompliant, and had labored breathing. There was documentary evidence indicating that Walling was restless, somewhat disoriented, in pain, being medicated with morphine for pain, and instructed not to get out of bed.
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> . . . . It is clear from the deposition testimony that a nursing background and nursing experience are at least somewhat necessary to render a risk assessment and to make a determination regarding which safety or monitoring precautions to utilize when faced with a patient who is at risk of falling. While, at first glance, one might believe that medical judgment beyond the realm of common knowledge and experience is not necessary when considering Walling's troubled physical and mental state, the question becomes entangled in issues concerning Walling's medications, the nature and seriousness of the closed-head injury, the degree of disorientation, and the various methods at a nurse's disposal in confronting a situation where a patient is at risk of falling. The deposition testimony indicates that there are numerous ways in which to address the risk, including the use of bed rails, bed alarms, and restraints, all of which entail to some degree of nursing or medical knowledge. . . . In sum, we find that, although some matters within the ordinary negligence count might arguably be within the knowledge of a layperson, medical judgment beyond the realm of common knowledge and experience would ultimately serve a role in resolving the allegations contained in this complaint. Accordingly, we find that the trial court did not err in dismissing the ordinary negligence claim.

Here, plaintiff alleged that defendants failed to (1) manage and treat the risk of injury and take steps to reduce it; (2) ensure policies, procedures, and protocols were followed to reduce the risk; (3) exercise necessary steps to reduce the risk; (4) watch, supervise, and monitor plaintiff; (5) take action to prevent harm after learning plaintiff was agitated, combative, confused, and hallucinating; and (6) take precautionary steps to reduce the risk after learning of these hazards. While there was expert testimony in *Sturgis Bank* indicating that there were "questions of medical judgment beyond the realm of common knowledge and experience", there is no question, based on *Sturgis Bank*, that the duties alleged here involved such questions and that an expert would be required to answer these questions. Accordingly, this case sounded in medical malpractice and was subject to the notice of intent requirements.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Deborah A. Servitto